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Supreme Court of the United States

OCTOBER TERM, 1962

No. 421

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

against

GOYA FOODS, INC.,

Respondent-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Introduction

The appellant, Goya Foods, Inc., by Morton Singer, Esq., prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 13, 1962. The order is set forth herein as Appendix A.

Opinion Below

The United States Court of Appeals for the Second Circuit granted the petition of the National Labor Relations Board (hereinafter called the "Board") for enforcement of its order made in its case 2-CA-7540-2 thru 9, reported as 132 NLRB No. 33. The opinion of the Court below appears at 303 F. 2d 442, and is set forth herein as Appendix B.

Jurisdiction

It is believed that jurisdiction is conferred on the Supreme Court of the United States by 28 U. S. C. Section 1254(1).

Statutes

The statute involved is the National Labor Relations Act, as amended (hereinafter referred to as the "Act"), Sections 2(3), 7, 8(a)(1), 8(a)(3), and set forth herein as Appendix C.

Statement

The appellant is a wholesaler of foodstuffs to retail stores (B. A. 14).* The case at bar concerns a reorganization by appellant commencing in late 1959 and continuing through April, 1960 of its sales force, coincident with a union organizing campaign occurring in March and April 1960 among the sales force personnel employed by Appellant, and affected by the reorganization of sales methods (B. A. 15-18).

As a result of the actions taken by the appellant both to reorganize its sales systems and to counter the organization by a part of its sales force for collective bargaining purposes, an unfair labor practice proceeding was begun, hearings held, and the appellant found to have engaged in activities proscribed by Sections 8(a)(1) and (3) of the Act.

The reorganization of the appellant's sales system, among other things, was found, in part, to be motivated by anti-union animus, and therefore violative of the right to collective bargaining guaranteed by the Act. Principal among the actions taken by appellant and found to be pro-

* References are to appendices in Court below, and abbreviated: "B. A." and page for Board's Appendix, and "R. A." and page for Appellant's Appendix.

scribed by the Act was the "discharge" by appellant of eight of its salesmen, effected on April 12, 1960 (B. A. 34-37), and the introduction of a change in the sales systems of the appellant designed to make the salesmen into independent brokers (a group excluded from the coverage of the Act by Section 2(3) thereof) (B. A. 34-37, 60-61).

The Board, in its order, after finding against the appellant on the complaint herein, ordered the appellant, among other things, to offer employment to these eight salesmen, together with back pay from April 12 to the date of the offer. As part of the offer to be made by appellant the Board specifically prohibits it from rehiring the former salesmen as independent brokers. The Board does find, however, that business conditions may not warrant rehiring all eight former salesmen at once, and does not require the appellant to do so (B. A. 5, 7, 72, 75).

The gravamen of the appeal here lies in events occurring on April 20, 1960. On that day the union, in the presence of, and on behalf of these eight salesmen had offered to abandon any claim to representation, to withdraw any unfair labor practice charges (which it did—the charges upon which this complaint are based are those of the individual employees), upon condition that the salesmen be returned to work. The appellant offered the salesmen terms to return which in terms of income to the salesmen were substantially similar to those obtaining before April 12 (B.A. 65), but also offered each an independent brokers contract. The Board and its Trial Examiner found that the offer of the union to abandon recognition and withdraw was not coerced by the appellant, and was made voluntarily by the union on behalf of the salesmen. The salesmen refused appellant's offer—but only because appellant was not then able to rehire all eight at once, but rather offered to take back four at the time and four at later dates as work became available. The Board, as noted above, found that this part of the offer was prompted by *bona*

fide economic conditions (B. A. 61-62, 3, 7, 37-41, 65, 68-69; R. A. 21-27).

Despite the events of April 20, and its own findings concerning the circumstances under which the offer of reemployment on April 20 came about, the Board nevertheless has concluded, with the approval of the Court below, that the eight former salesmen still continued thereafter to be "discharged" by the appellant in violation of the Act, because the offer included independent broker status for the salesmen. Accordingly, the order provides for back pay to the day of a new offer, yet to be made, instead of cutting off back pay on the date the salesmen refused employment, April 20.

Briefly stated, it is appellant's contention that the sole reason the salesmen continued to be unemployed after April 20 was because they made an economic demand—the hiring of salesmen for whom work was not then available—to which the appellant (with the later approval of the Board, as seen by its Order) could lawfully refuse to accede, and for no other reason.

There is no finding of fact whatsoever that any unfair labor practice by the appellant prompted the refusal of the salesmen to return to work on April 20, or that the offer of April 20 in any manner affected, coerced, or restrained the salesmen in the exercise of their rights under the Act.

It is, the appellant contends, essential to any finding of a violation or continuing violation on and after April 20 that the record contain facts which show that appellant's conduct and offer of that date did, in fact, affect the rights of these salesmen under the Act or did in fact cause them to be restrained or coerced into failing to exercise those rights.

Finally, it is asserted, that the record contains no such facts, but, indeed, demonstrates to the contrary, that the sole reason for the continued refusal by these former

salesmen to work for appellant was a desire to attain an economic demand which was not met, and need not have been met, by appellant.

The Question Presented

Can the Board find that employees who have been discharged in violation of their rights under the Act continue to be so discharged after an offer to reinstate them to jobs that, in economic terms, are substantially equivalent to their former jobs has been made to them, and rejected by them, for reasons unconnected with any prior unfair labor practices committed at the time of their original discharge, and without a showing that, at the time of the offer of reinstatement, and its rejection, they were in any manner coerced or restrained by any such prior unfair labor practice, or unlawful discharge, from exercising their rights under the Act?

The Question Is Substantial

A—The cases in the Circuit Courts are in conflict.

The Ninth Circuit in *NLRB* v. *Scott & Scott*, 245 F. 2d 926 (and see the cases collected therein in various other circuits) and the Second Circuit in *NLRB* v. *James Thompson & Co.*, 208 F. 2d 743 have held that a causal connection must be shown between an unfair labor practice committed by an employer and subsequent employee action, to call into play the remedies afforded by the Act.

So, for example, an economic strike—in which strikers are subject to replacement by the employer—does not become an unfair labor practice strike—in which strikers have an unconditional right to return to work and cannot be replaced—merely because the employer during the course of the strike commits an unfair labor practice, *unless* it can be shown that the strike continues, or is directly affected by that unfair labor practice.

The Board itself, in such cases as *Stowe-Woodward, Inc.*, 123 NLRB No. 28 has demanded a factual demonstration of a causal connection showing that employees have actually been coerced, or restrained in some manner by an unfair labor practice in the exercise of their rights under the Act before it will order a remedy against an offending employer.

In the instant case, without explicitly so stating, the Board has reversed itself, and the resultant enforcement by the Court below creates a conflict in the decisions in the various Circuit Courts.

There is no doubt in the record here that the fact that, on April 20, the appellant still wanted to institute a system of independent brokers for his sales, whether or not that action amounted originally, to an unfair labor practice by the appellant, had nothing at all to do with the continued refusal of the salesmen to return to work.

Nor does the Court find any such causal connection. What, in fact the Court says, is that under no circumstances can the appellant "purge" itself of its prior unfair labor practices so long as it persists in the offer of independent brokerages to the salesmen.

The decision below, then, rests not upon a factual finding that the offer of April 20 had a coercive effect or restrained any employee in the exercise of his rights under the Act but that *no* offer could have been made that included independent brokerages regardless of its actual effect upon the salesmen, and regardless of their reasons for rejecting that offer.

At no time does the record indicate that the eight salesmen ever concerned themselves with that part of the appellant's offer of April 20 which identified them as independent brokers, much less rejected that part of the offer, or even so much as discussed it.

The conflict between this decision and the *Scott & Scott* case is apparent. In the latter case, the clear holding is that there must be a factual showing that the unfair labor practice affected the rights of employees under the Act before the Board can find a wrong to be remedied. In the instant case the holding is clear that regardless of any factual relationship or causal connection, the Court has upheld the Board in finding a continuing unfair labor practice after the meeting of April 20. These decisions cannot stand together.

B—The Question Presented has pervasive importance in Labor-Management Relations.

Almost inevitably, in situations where important economic issues are at stake between employer and employee, either or both will indulge in some action which may be an unfair labor practice and the basis for relief under the Act. Most often, however, it is apparent from the situation itself that such actions do not materially affect the ultimate outcome—or indeed, affect it at all.

If, however, it becomes the rule of law that *any* unfair labor practice, whether or not it has any effect upon the relationship between the parties and an ultimate adjustment, can become the basis for later action, calling the party committing the wrong to account, then the entire process of give and take in bargaining will be seriously affected. *De minimis non curat lex* has a vital and real application to the complexities of modern labor-management relations.

The Court, here, for example, relies heavily on the fact that the independent broker system was not an economic necessity. It is by no means unusual to find a desperate

and tense bargaining situation settled by a concession that can never be said by any stretch of the term to be an economic necessity. A concession may even be, as here, part of a complex of actions that did constitute at one point in time an unfair labor practice, but, when taken in the larger terms of a developing situation, is one which does not, in fact, affect the real interests of the party of whom it sought as defined by that party.

If, then, this decision, calling, upon the appellant to "purge" itself by desisting in its desire to institute an independent brokerage system, after that system is no longer an issue, is sustained, a material disservice to the realities of collective bargaining will have been done.

The salesmen themselves had, by April 20, been willing to accept independent brokerages, and the Court and the Board should not undertake to substitute their judgment for that of the salesmen, where, as here, no showing can be made that they were in any manner deprived of any rights under the Act which they sought to assert. In this regard, it should be recalled, that several Circuit Courts have upheld the right of an employer to institute an independent brokerage system where there was no "economic necessity" shown, but merely a desire of the employer so to run his affairs, including, in part, a desire to avoid unionization. *NLRB* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, *NLRB* v. *Lassing*, 284 F. 2d 781, cert. den. 366 U. S. 909, *NLRB* v. *McGohey*, 233 F. 2d 406, *NLRB* v. *Adkins Transfer*, 226 F. 2d 324, *NLRB* v. *Mahon*, 269 F. 2d 44.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

MORTON SINGER,
Counsel for Appellant.

APPENDIX A

(Order of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 27329

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

GOYA FOODS, INC.,

Respondent.

DECREE

Before:

CLARK, KAUFMAN and HAYS, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on July 31, 1961. The Court heard argument of respective counsel on May 9, 1962, and has considered the briefs and transcript of record filed in this cause. On May 29, 1962, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Goya Foods, Inc., its officers, agents, successors and assigns

abide by and perform the direction of the Board in said order contained.

IRVING R. KAUFMAN,
Judge, United States Court of Appeals for the Second Circuit.

PAUL R. HAYS,
Judge, United States Court of Appeals for the Second Circuit.

Filed: June 13, 1962.

A true copy.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 319—September Term, 1961.

(Argued May 9, 1962 Decided May 29, 1962.)

Docket No. 27329

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

GOYA FOODS, INC.,

Respondent.

Before:

CLARK, KAUFMAN and HAYS, *Circuit Judges*.

Petition for enforcement of an order of the National Labor Relations Board. Enforcement granted.

MELVIN POLLACK, Attorney, N. L. R. B., Washington, D. C. (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Elliot Moore, Attorney, N. L. R. B., Washington, D. C., on the brief), for Petitioner.

BURTON H. ZUCKERMAN, New York, New York, for Respondent.

PER CURIAM:

The National Labor Relations Board petitions for enforcement of an order requiring the respondent, Goya

Foods, Inc., to discontinue certain activities found to violate §§ 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U. S. C. § 158 (1958) and to reinstate discharged employees. The Board's decision and order are printed at 132 N. L. R. B. No. 33.

There is substantial evidence in the record to support the Board's findings that Charles Unanue, respondent's president, by threats of economic reprisal, promises of benefit and other coercive conduct infringed on the rights of respondent's salesmen to organize, in violation of § 8(a)(1) of the Act. There is also evidence which supports the finding that respondent adopted a system of sales through independent brokers, in lieu of salesmen, to avoid unionization, and that respondent discharged his salesmen and offered some of them reemployment as "independent brokers," not for economic reasons, but to prevent them from organizing and selecting a collective bargaining representative, all in violation of both § 8(a)(1) and (3) of the Act.

Respondent argues that after April 20, 1960, the former salesmen voluntarily abandoned the union and the sole remaining dispute was "economic," concerned only with the terms of reinstatement. However, one of the conditions of reinstatement was the continuation of the independent broker system, which the Board found was undertaken to defeat the rights of the salesmen under the Act. Respondent could not purge himself of the unfair labor practice as long as he persisted in this scheme.

That a plan for exclusive sales areas had been previously adopted did not justify the independent broker system, which the Board found had not been previously intended and was not necessary to that end. For this reason, *NLRB v. Houston Chronicle Pub. Co.*, 211 F. 2d 848 (5th Cir. 1954), relied on respondent, is not in point.

Respondent's complaints about the nature of the order are unfounded since the order expressly takes account of respondent's decreased needs under the exclusive sales area arrangement.

Enforcement granted.

APPENDIX C

(Excerpts from National Labor Relations Act)

* * *

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •